No. 17-1091

In The
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Writ Of Certiorari To The Indiana Supreme Court

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioners are Tyson Timbs and his 2012 Land Rover LR2. Respondent is the State of Indiana. Additional plaintiffs before the state trial court were the J.E.A.N. Team Drug Task Force, the Marion Police Department, and the Grant County Sheriff's Department.

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INTRODUCTION

Five Terms ago, this Court observed—correctly—that the Excessive Fines Clause applies to the States: "The Eighth Amendment provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,'" and "[t]he Fourteenth Amendment applies those restrictions to the States." *Hall* v. *Florida*, 134 S. Ct. 1986, 1992 (2014). The Court made a similar observation in 2001—that "the Fourteenth Amendment . . . makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Cooper Indus.* v. *Leatherman Tool Grp.*, 532 U.S. 424, 433–34 (2001). And on several other occasions over the last 30 years, the Court has made statements to the same effect.[1]

Perhaps because those cases did not involve fines, the Indiana Supreme Court "decline[d]" to treat the Excessive Fines Clause as incorporated against the States. Pet. App. 9. But the Clause easily meets the standard for incorporation. Freedom from excessive fines is both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and

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[1] *See Kennedy* v. *Louisiana*, 554 U.S. 407, 412, 419 (2008); *Roper* v. *Simmons*, 543 U.S. 551, 560 (2005); *Booth* v. *Maryland*, 482 U.S. 496, 501 n.5 (1987), *overruled on other grounds*, *Payne* v. *Tennessee*, 501 U.S. 808 (1991); *see also Baze* v. *Rees*, 553 U.S. 35, 47 (2008) (plurality opinion); *Harmelin* v. *Michigan*, 501 U.S. 957, 962 (1991) (opinion of Scalia, J.); *Thompson* v. *Oklahoma*, 487 U.S. 815, 819 n.1 (1988) (plurality opinion).

tradition." *McDonald* v. *City of Chicago*, 561 U.S. 742, 767 (2010) (emphasis and quotation marks omitted).

Whether the question presented is viewed through the Due Process Clause or the Privileges or Immunities Clause, the right to be free from excessive fines is fundamental and applies to the States. The power to fine is—and has always been—a formidable one. And unlike every other form of punishment, fines and forfeitures are a source of revenue for the government, making them uniquely prone to abuse. The accompanying risk to life, liberty, and property is very real. "[I]n a free government," after all, "almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1784, 661 (1833). The Court should thus adhere to its statements in *Hall*, *Cooper Industries*, and other decisions and hold that the Excessive Fines Clause applies to the States under the Fourteenth Amendment.

OPINIONS BELOW

The opinion of the Indiana Supreme Court is reported at 84 N.E.3d 1179. *See* Appendix to Petition for a Writ of Certiorari (Pet. App.) 1–12. The opinion of the Indiana Court of Appeals is reported at 62 N.E.3d 472. *See* Pet. App. 13–26. The opinions of the Grant County Superior Court are unpublished, but are reproduced at Pet. App. 27–34.

JURISDICTION

The Indiana Supreme Court entered judgment on November 2, 2017. The petition for a writ of certiorari was filed on January 31, 2018. This Court granted the petition on June 18, 2018. This Court has jurisdiction because the "highest court of a State" disposed of the case based on a "right, privilege, or immunity . . . claimed under the Constitution." 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

1. After his father died, Tyson Timbs (Petitioner) received around $73,000 in life-insurance proceeds. Hrg. Tr. 38:12–38:21 (July 15, 2015). He used roughly $42,000 of that money to buy the SUV at issue in this case. Pet. App. 2.

At the time, Petitioner had recently moved to Marion, Indiana, to help his aunt and try to rebuild his life. Timbs C.A. App. vol. 2, p. 26 (sealed presentence report). Before that, Petitioner lived in St. Mary's, Ohio, where he became addicted to hydrocodone, an opioid medication prescribed to him to alleviate persistent foot pain. *Id.* When his prescription ran out, he began buying pills from drug dealers. *Id.* When his dealer had no pills one day, he turned to heroin as a substitute. *Id.*

For a short time after moving to Marion, Petitioner overcame his addiction. *Id.* But he relapsed around the time his father died. *See id.* 26–27. His money soon ran out. And while Petitioner was looking for new ways to fund his addiction, a confidential informant connected him with heroin buyers, who turned out to be undercover police officers. Pet. App. 14. Over the coming weeks, Petitioner engaged in two drug transactions with the officers. Pet. App. 14–15. The first time, he drove to meet the officers and sold them two grams of heroin for $225. Hrg. Tr. 26:25–27:02, 37:03–37:12 (July 15, 2015). A few days later, he walked to a nearby gas station, where he sold them another two grams, for $160. Hrg. Tr. 29:06–29:20 (July 15, 2015). En route to a third transaction, officers pulled Petitioner over and

arrested him. Pet. App. 15. They seized his vehicle on the spot. State C.A. App. p. 10.

The State of Indiana charged Petitioner with two counts of dealing in a controlled substance and one count of conspiracy to commit theft. Pet. App. 15.[2] Two years later, he pleaded guilty to one of the two counts of dealing and to the count of conspiracy to commit theft. Pet. App. 15. The trial court sentenced him to six years—one year on home detention (with his aunt) and the remaining five years on probation, including a court-supervised addiction-treatment program. Pet. App. 15; Timbs C.A. App. vol. 1, pp. 19–20. The court also assessed Petitioner investigation costs ($385), an interdiction fee ($200), court costs ($168), a bond fee ($50), and $400 for drug-and-alcohol assessment through the probation department. *See* Pet. App. 15.

2. While Petitioner's criminal case was pending, a private law firm filed a civil case to forfeit his vehicle on behalf of the State. *See* State C.A. App. pp. 10–11. The complaint "referred only to May 31, 2013"—the date on which Petitioner was arrested—and alleged the vehicle "had been . . . used to facilitate any violation of a criminal statute." Pet. App. 21, 22 n.2.

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[2] In a post-arrest interview, detectives asked why Petitioner and his companion had no heroin in the vehicle at the time of his arrest, since undercover officers expected to buy heroin. Petitioner told them, "we thought about maybe just pulling up and, if he would've gave me the money, just driving away . . . I'm not really sure what we were going to do." State's Trial Ex. 1 at 19:23–20:00, 21:03–21:25; *see also* Hrg. Tr. 16:11–18:10 (July 15, 2015). These statements appear to have been the basis for the theft charge.

Following Petitioner's guilty plea, the trial court held an evidentiary hearing in the civil-forfeiture case. The court found that Petitioner purchased the vehicle legally, using his father's life-insurance proceeds, but later used it to "transport . . . heroin back to Marion." Pet. App. 28 ¶¶ 2–3. Based on the record, the court determined that forfeiture would be "grossly disproportional to the gravity of [Petitioner's] offense" and thus unconstitutional under the Eighth Amendment's Excessive Fines Clause. Pet. App. 29–30 ¶¶ 6–9; *see generally Hudson* v. *United States*, 522 U.S. 93, 103 (1997) ("The Eighth Amendment protects against excessive civil fines, including forfeitures." (citing *Austin* v. *United States*, 509 U.S. 602, 622 (1993)). "While the negative impact on our society of trafficking in illegal drugs is substantial," the court acknowledged, "a forfeiture of approximately four (4) times the maximum monetary fine is disproportional to [Petitioner's] illegal conduct." Pet. App. 30 ¶ 9.

3. A divided panel of the Indiana Court of Appeals affirmed. Pet. App. 13–26. The court concluded that "[t]he United States Supreme Court has yet to hold that the Excessive Fines Clause is applicable to the States." Pet. App. 17–18 n.4. Based on its own precedent, however, the court held that the Clause applies in Indiana. Pet. App. 18 n.4.

The court then affirmed that forfeiting Petitioner's vehicle would be unconstitutional. The court compared the value of the vehicle (around $42,000) to the maximum criminal fine for Petitioner's drug offense

($10,000). Pet. App. 14, 20–21.[3] The court noted the "financial burdens" that "had already been imposed on [Petitioner] when he pleaded guilty." Pet. App. 21. And the court concluded that the State's forfeiture complaint appeared to allege a single predicate offense—the unconsummated third transaction. Pet. App. 21. Even considering the record as a whole, the court observed that "the only evidence before the trial court was that [Petitioner] sold heroin twice, both times as a result of controlled buys." Pet. App. 22. Based on these facts, the court affirmed that "[f]orfeiture of the Land Rover . . . was grossly disproportionate to the gravity of [Petitioner's] offense." Pet. App. 24.

4. The Indiana Supreme Court granted review and reversed. Pet. App. 1–12. Surveying decisions that have addressed incorporation, Pet. App. 5–7, the court concluded that "[t]he Supreme Court has never held that States are subject to the Excessive Fines Clause," Pet. App. 5. "Given the lack of clear direction from the Supreme Court," the court "decline[d] to find or assume incorporation." Pet. App. 8. Citing Indiana's status as "a sovereign state within our federal system," the court held that it would not "impose federal obligations on the State that the federal government itself has not mandated." Pet. App. 9.

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[3] Indiana authorizes a maximum $10,000 fine for every class of felony. *See* Ind. Code §§ 35-50-2-4 to -7.

SUMMARY OF ARGUMENT

Whether viewed through the Fourteenth Amendment's Due Process Clause or its Privileges or Immunities Clause, the Excessive Fines Clause applies to the States.

First, the Due Process Clause incorporates the right to be free from excessive fines because it is among those rights that are "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *McDonald* v. *City of Chicago*, 561 U.S. 742, 767 (2010) (emphasis and internal quotation marks omitted). When the Eighth Amendment was ratified, in 1791, protections against excessive fines were already fundamental and deeply rooted in the Anglo-American legal tradition. When the Fourteenth Amendment was ratified, in 1868, the right continued to rank among Americans' most basic liberties. That remains equally true today.

Applying the Excessive Fines Clause to the States is also consistent with this Court's Eighth Amendment precedent. Like the protections against "cruel and unusual punishments" and "excessive bail"—which have long been understood to apply to the States—the Excessive Fines Clause "prevent[s] the government from abusing its power to punish." *Austin* v. *United States*, 509 U.S. 602, 607 (1993) (emphasis omitted). Put differently, the Amendment's three Clauses embody "parallel limitations" on the government's punitive power. *Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 263 (1989) (quoting *Ingraham* v. *Wright*,

430 U.S. 651, 664 (1977)). There is thus "no reason to distinguish one Clause of the Eighth Amendment from another for purposes of incorporation." *Id.* at 284 (O'Connor, J., concurring in part and dissenting in part). Like the Eighth Amendment's two other Clauses, the Excessive Fines Clause applies to the federal government and the States alike.

Second, the Privileges or Immunities Clause provides an alternative path for holding that the Excessive Fines Clause applies to the States. Like other rights secured in the first eight Amendments, the right to be free from excessive fines is one of the "privileges or immunities of citizens of the United States," which no State may abridge. For this reason, too, the Excessive Fines Clause is applicable to the States.

ARGUMENT

I. The Excessive Fines Clause applies to the States under the Fourteenth Amendment's Due Process Clause.

The Excessive Fines Clause applies to the States because it is "incorporated in the concept of due process." *See McDonald* v. *City of Chicago*, 561 U.S. 742, 767 (2010). This Court long ago "shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause." *Id.* at 764. And under the "well established" standard set forth in *McDonald*, *id.* at 750, the Excessive Fines Clause merits incorporation. The right to be

free from excessive fines was deeply rooted at the time of the framing. It was deeply rooted at the time of the Fourteenth Amendment's ratification. It remains deeply rooted today. *Cf. id.* at 917 (Breyer, J., dissenting) (inquiring whether right "has remained fundamental over time"). The only approach consistent with this Court's Eighth Amendment precedent is to apply the Excessive Fines Clause to the States.

A. When the Eighth Amendment was ratified, the right to be free from excessive fines was already deeply rooted in the Anglo-American legal tradition.

The right to be free from excessive fines is fundamental and "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 767 (citation omitted). The Amendment's language was lifted almost verbatim from the Virginia Declaration of Rights, which borrowed in turn from the 1689 English Bill of Rights, which declared: "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689), *quoted in Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 266–67 (1989). Blackstone traced the protection against excessive fines back further still, to Magna Carta, and before that to the reign of Henry II. 4 William Blackstone, Commentaries *372; *see also Browning-Ferris Indus.*, 492 U.S. at 270 n.14; *cf. McDonald*, 561 U.S. at 768 (looking to Blackstone and the English

Bill of Rights to determine that the Second Amendment is incorporated). Throughout these periods, the right to be free from excessive fines has been closely linked to securing life, liberty, and property.

1. Concerns about the abuse of the sovereign power to fine date back at least to Norman times. "So intimate is the connexion of judicature with finance under the Norman kings," wrote one nineteenth-century scholar, "that it was mainly for the sake of the profits that justice was administered at all." 1 William Stubbs, *The Constitutional History of England* § 127, 438 (1880). Magna Carta imposed an early check on the king's power to fine, providing that "[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement." Magna Carta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 5 (1769), *confirmed*, 25 Edw. I, ch. 1 (1297), 1 Stat. at Large 131–32, *quoted in Browning-Ferris Indus.*, 492 U.S. at 270 n.14. Sixty years later, Parliament prohibited excessive fines by statute, providing that no man might "be amerced, without reasonable cause, and according to the quantity of his Trespass." The Statutes of Westminster, 3 Edw. I, ch. 6 (1275), in 1 Statutes of the Realm 28 (reprint 1963).

2. Four centuries later, in the 1600s, abuses by the Stuart kings led Parliament to enact even more concrete protections against excessive fines. *See Browning-Ferris Indus.*, 492 U.S. at 268 (looking to the "more recent history" of seventeenth-century England).

a. During Charles I's reign, fines served to raise revenue, target dissenters, and disrupt the balance of power between Parliament and the crown. Ordinarily, Parliament's power over the purse meant the monarch had to call Parliamentary sessions with some regularity. (With minor exceptions, Parliament alone had the power to tax.) Charles, however, dissolved Parliament for over a decade, resorting instead to abusive fines to keep his treasury afloat. Because "[n]ew resources of revenue . . . had now to be discovered," offenses "were sedulously sought for among the clauses of obsolete statutes, to discover pretexts under which money might be extorted." 1 *The Fairfax Correspondence: Memoirs of the Reign of Charles the First* 212 (George W. Johnson ed., 1848) (*Fairfax Correspondence*). For example, the king resurrected a "fine imposed upon all owning land worth forty pounds a year, who had neglected to be knighted." Godfrey Davies, *The Early Stuarts: 1603–1660*, at 83 (2d ed. 1959). In this way, he "mulct[ed] . . . the less wealthy classes of the community," and "very many were put to grievous fines and other vexations." *Fairfax Correspondence* 213. "Another mode of extracting money was to grant licenses to build houses, and then pretend that the houses were built contrary to proclamation, and extort heavy fines." 1 Andrew Bisset, *The History of the Struggle for Parliamentary Government in England* 107–08 (1877).

To target "those of higher pretensions and more ample means," the king revived other "obsolete laws." *Fairfax Correspondence* 213. He declared enormous tracts of land "forests"—and thus his personal

domain—and fined those who already lived there. "[T]he smallest encroachments on the part of the citizens were noticed and punished by exorbitant fines." 1 François Guizot, *History of the English Revolution From the Accession of Charles I*, at 73 (Louise H.R. Coutier trans., 1838). "The Bounds of the Forest of Rockingham," for example, "were increased from six Miles to sixty," and landowners within the new boundaries were fined between £3,000 and £20,000. Letter from George Garrard to Thomas Wentworth, Oct. 9, 1637, *reprinted in* 2 *The Earl of Strafforde's letters and dispatches* 117 (William Knowler ed., 1739). With good reason, Parliament's "Grand Remonstrance"—issued on the brink of the English Civil War—repeatedly cited the king's fines as "against all the rules of justice." The Grand Remonstrance ¶ 17 (1641), *reprinted in The Constitutional Documents of the Puritan Revolution, 1625–1660*, at 202–32 (Samuel Rawson Gardiner ed., 3d ed. 1968); *see also id.* ¶¶ 37, 159–60.

b. Abusive economic sanctions became a political flashpoint again during the reigns of Charles's sons—Charles II and James II. "[T]owards the end of Charles II's reign, the courts imposed ruinous fines on the critics of the crown." *See* Lois G. Schwoerer, *The Declaration of Rights, 1689*, at 91 (1981). These practices caused renewed tensions with Parliament. In 1681, the House of Commons tried (unsuccessfully) to impeach the Lord Chief Justice of the King's Bench based in part on his "notorious[] depart[ure] from all Rules of Justice and Equality, in the Imposition of Fines upon Persons convicted of Misdemeanors."

Articles of Impeachment of Sir William Scroggs, 9 Journals of the House of Commons 698 (Jan. 3, 1681) (reprint 1803). The Lord Chief Justice and his subordinates were said to have deliberately imposed lenient fines on Catholics and harsh ones on Protestants, "[b]y which arbitrary, unjust, and partial Proceedings, many of his Majesty's Liege People have been ruined." *Id.*; *see also* Schwoerer, *supra*, at 91.

Abuses worsened when the king's friends gained a personal stake in fines and forfeitures. Embracing a long-discredited practice, Charles II and James II outsourced their fining power to courtiers, foresters, and other people who would pay for the privilege. *See, e.g.*, *Calendar of State Papers, Domestic Series, of the Reign of Charles II, 1661–1662*, at 234 (Mary A.E. Green ed., 1861) (reprint 1968) (recording a petition for "lease for 21 years of the King's moiety of all fines and forfeiture on penal statutes and recognizances" in Devon, in exchange for £30 rent). Such self-interested prosecutors (as Sir Edward Coke warned a generation before) would use "undue means" and "violent prosecution" to pursue "private lucre." *See* Schwoerer, *supra*, at 96 & n.223. "Nothing has been more practiced," said Richard Hampden (later, a member of the 1689 rights committee), "nor more have suffered under, than when upon an Indictment the Fine is begged." 9 *Debates of the House of Commons from the Year 1667 to the Year 1694*, at 44 (Anchitell Grey ed., 1763); *see also* Schwoerer, *supra*, at 96 ("In 1680 . . . an M.P. blamed exorbitant fines on the begging of fines by courtiers, who then put pressure on the bench to set the fine at a large figure.").

Matters deteriorated further in the years leading up to the Glorious Revolution. "In the 1680's the use of fines 'became even more excessive and partisan,' and some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed." *Browning-Ferris Indus.*, 492 U.S. at 267 (quoting Schwoerer, *supra*, at 91). The sheriff of London "was fined £100,000 in 1682 for words spoken against the duke of York." Schwoerer, *supra*, at 91. "In 1684 Sir Samuel Barnardiston was fined £10,000 for writing letters alleged to be seditious; the sum was so huge that he languished in prison and his estate was ruined." *Id.* In a case against John Hampden—another future member of the 1689 rights committee—the notorious Judge Jeffreys ruled that Magna Carta's limitations on "amercements" did not apply at all "to fines for offenses against the king." *Id.*; *see also* 9 *Cobbett's Complete Collection of State Trials* 1053 n.*, 1125 (1811).[4]

Against this backdrop, Parliament paid careful attention to the sovereign's power to punish after James II abdicated in 1688. Cataloging how the king had acted "utterly and directly contrary to the knowne Lawes and Statutes and freedom of this Realme," 1 Wm. & Mary, 2d Sess., ch. 2 (1689), in 6 Statutes of the

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[4] *See generally* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 87 (1998) ("[I]n the late eighteenth century, every schoolboy in America knew that the English Bill of Rights' 1689 ban on excessive bail, excessive fines, and cruel and unusual punishments—a ban repeated virtually verbatim in the Eighth Amendment—arose as a response to the gross misbehavior of the infamous Judge Jeffreys.").

Realm 142–45 (reprint 1963), the English Bill of Rights devoted two paragraphs to abusive fines. In addition to "Excessive fines," the king had made "severall Grants and Promises . . . of Fines and Forfeitures"—giving away or selling the power to collect fines. *Id.* Parliament sought to ensure that England's "Religion Lawes and Liberties might not againe be in danger of being Subverted," and so provided "[t]hat excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." *Id.* Freedom from excessive fines, the Bill of Rights confirmed, was one of the "a[nc]ient Rights and Liberties" of English subjects. *Id.*

3. Across the Atlantic, this history helped shape the American colonists' view of their fundamental rights. In the 1630s—during the Puritan emigration to America—one of England's leading Puritan politicians was twice fined £5,000 (and mutilated) for seditious libel. Ethyn Williams Kirby, *William Prynne: A Study in Puritanism* 29, 42 (1931). During the persecution of the Quakers, William Penn was fined 40 marks for refusing to remove his hat in an English court. When a jury refused to convict Penn of the underlying charge (unlawful assembly), the court fined the jurors too. John A. Phillips & Thomas C. Thompson, *Jurors v. Judges in Later Stuart England: The Penn/Mead Trial and Bushell's Case*, 4 Law & Ineq. 189, 203, 214 (1986). A decade later, Penn's "Frame of the Colony of Pennsylvania" would provide "[t]hat all fines shall be moderate, and saving men's contenements, merchandize, or wainage." Nicholas M. McLean, *Livelihood, Ability to*

Pay, and the Original Meaning of the Excessive Fines Clause, 40 Hastings Const. L.Q. 833, 866 (2013). New Yorkers included a similar provision in their charter in 1683. *See id.* And during a short-lived revolt in Maryland, in 1689, the rebels' grievances included: "[T]he Imposseinge Exessive fines Contrary to magna Charta." *Id.* (quoting "Mariland's Grevances Wiy The Have Taken Op Arms" (Beverly McAnear ed.), *reprinted in* 8 J. S. Hist. 392, 401 (1942)).

A century later, the right to be free from excessive fines remained fundamental to the citizens of the new United States. In 1776, the Virginia Convention adopted a Declaration of Rights, which drew verbatim from the English Bill of Rights: "[E]xcessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Va. Decl. of Rights of 1776, § 9. Delaware followed suit later that year, with a "declaration of rights and fundamental rules of this State" that mirrored Virginia's Section 9 almost word for word. *See* Del. Const. of 1776, art. 30; Del. Decl. of Rights § 16 (Sept. 11, 1776). In the Northwest Ordinance, the Confederation Congress provided that "[a]ll fines shall be moderate" northwest of the Ohio River. Northwest Ord. § 14, art. 2 (1787).

By 1790, nine of the 13 States included excessive-fines protections in their constitutions. *See* Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. Cal. L. Rev. 1451, 1517 & nn.269 & 271 (2012) (collecting provisions). While still independent, Vermont adopted

equivalent language—requiring that "all fines shall be proportionate to the offences." *Id.* at 1517 & n.272 (quoting Vt. Const. of 1786, Plan or Frame of Gov't, § 29). And with Vermont's admission to the Union, in March 1791, three-quarters of the American population lived in States with explicit prohibitions on excessive fines in their state charters. *Id.* at 1517–18; *cf. McDonald*, 561 U.S. at 769 (looking to state constitutions during the period surrounding ratification of the Bill of Rights to determine incorporation).

The same mistrust of the power to punish inspired ratification of the Eighth Amendment in 1791. The Amendment's "primary focus . . . was the potential for governmental abuse of its 'prosecutorial' power," *Browning-Ferris Indus.*, 492 U.S. at 266, with the Excessive Fines Clause in particular "limiting the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends," *id.* at 267. Even opponents of the Bill of Rights viewed the right to be free from excessive fines as fundamental to the new Nation's legal system. Edmond Randolph, for instance, thought the right so fundamental that it would be foolish to enumerate it: "As to the exclusion of excessive bail and fines, and cruel and unusual punishments," he argued, "this would follow of itself, without a bill of rights." 3 *The Debates of the Several State Conventions on the Adoption of the Federal Constitution* 467–68 (Jonathan Elliot ed., 1854). By ratifying the Excessive Fines Clause and its surrounding protections, the American people thus enshrined a well-established "liberty of their heritage." Laurence Claus,

The Antidiscrimination Eighth Amendment, 28 Harv. J.L. & Pub. Pol'y 119, 134 (2004).

B. When the Fourteenth Amendment was ratified, the right to be free from excessive fines remained fundamental to our Nation's legal system.

Americans continued to cherish their freedom from excessive fines 75 years later, when the Fourteenth Amendment was ratified. As Congress debated the language of the proposed Amendment, in 1866, members regarded the right as essential to our system of ordered liberty. And when the States ratified the Amendment, in 1868, each of their state constitutions included an enumerated protection against excessive fines. As the history of this period confirms, the Excessive Fines Clause was among the provisions of the Bill of Rights that the Fourteenth Amendment incorporated against the States.

1. The years following the Civil War illustrate how economic sanctions threatened to undermine the rights of the Nation's most oppressed citizens. Across the South in 1865–66, lawmakers adopted "Black Codes," which violated the fundamental liberties of newly freed slaves and their supporters. *See generally* Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 35 (1986). Economic sanctions were a common feature of the Black Codes, with southern States using fines and forfeitures to subjugate African Americans and

protect the status quo. *Cf. McDonald*, 561 U.S. at 771 (discussing the Black Codes to analyze incorporation of the Second Amendment). For example, in 1866, Alabama provided that any judge, minister, or officiant who married an interracial couple would "be fined not less than one hundred, nor more than one thousand dollars" and could face six months' imprisonment. 1866 Ala. Penal Code p. 31, § 62, *reprinted in* 1 *Documentary History of Reconstruction* 274 (Walter L. Fleming ed., 1950) (Fleming).

Alabama was not alone in using fines as a tool for oppression. Florida, for example, made it a misdemeanor to "entice, induce, or otherwise persuade" any person to break a labor contract, providing that offenders "shall be fined in a sum not exceeding one thousand dollars, or shall stand in the pillory not more than three hours, or be whipped not more than thirty-nine stripes on the bare back, at the discretion of the jury." Acts & Resolutions of General Assembly of Florida, 1865–66, p. 32, § 5, *reprinted in* 1 Fleming 277. Teaching at a school for "persons of color" without a special license triggered a fine of "not less than one hundred dollars, nor more than five hundred dollars," unless the court imposed a prison sentence. *Id.*, p. 37, § 11, *reprinted in* 1 Fleming 278–79. In Louisiana's St. Landry Parish, African Americans were prohibited from preaching "to congregations of colored people" without permission—a crime that triggered a $10 fine, ten days' work on a public road, or physical punishment. Senate Ex. Doc. No. 2, 39th Cong., 1st Sess., p. 93, *reprinted in* 1 Fleming 280; *see also* 1 Fleming 279

(explaining that Louisiana implemented Black Codes at the parish level). If an African American were so much as "found drunk" in St. Landry, he or she would be fined "five dollars, or in default thereof work five days on the public road," unless the court imposed physical punishment. Senate Ex. Doc. No. 2, 39th Cong., 1st Sess., p. 93, *reprinted in* 1 Fleming 281.

Mississippi adopted similar measures backed by stiff fines, forfeitures, and—for those who failed to pay—a system of debt-slavery that closely resembled chattel slavery. Adult "freedmen, free negros and mulattoes" were required to have a job; those without a job faced $50 in fines and ten days' imprisonment. 1865 Miss. Laws p. 90, § 2, *reprinted in* 1 Fleming 284. Any "white persons" associating with people of color "on terms of equality" faced a $200 fine or six months' imprisonment. *Id.* If a black laborer "quit the service of [an] employer before the expiration of his term of service," he would "forfeit his wages for that year up to the time of quitting." *Id.* p. 82, § 6, *reprinted in* 1 Fleming 288. African Americans who dared "exercis[e] the function of a minister of the Gospel without a license" faced fines of "not less than ten dollars, and not more than one hundred dollars" and could be imprisoned for up to 30 days. 1865 Miss. Laws p. 165, § 2, *reprinted in* 1 Fleming 290. People convicted of any one of these crimes had just five days to pay or they would be arrested and leased to "any person who will, for the shortest period of service, pay said fine and forfeiture and all costs." *Id.*, p. 90, § 5, *reprinted in* 1 Fleming 285; *id.*, p. 165, § 5, *reprinted in* 1 Fleming 290.

Vagrancy laws were another invidious feature of the Black Codes, with some States using broadly worded restrictions to trap African Americans in de facto slavery. "Every southern state except Arkansas and Tennessee had passed laws by the end of 1865 outlawing vagrancy and so vaguely defining it that virtually any freed slave not under the protection of a white man could be arrested for the crime." Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II*, at 53 (2008). Once convicted, vagrants often would be sold into de facto slavery by state or local governments; almost all southern States "provided for the hiring-out of vagrants" along with "other county prisoners who could not pay their fines and costs." William Cohen, *At Freedom's Edge: Black Mobility and the Southern White Quest for Racial Control, 1861–1915*, at 33 (1991).

These and other provisions of the Black Codes galvanized support in Congress for reformulating the relationship between the federal government and the States. *See* Curtis, *supra*, at 35, 48–49, 51–56. In the Civil Rights Act of 1866, Congress provided that all citizens "shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." 14 Stat. 27. Section 14 of the Freedmen's Bureau Act of 1866 similarly outlawed "penalt[ies] or punishment[s]" based on race. 14 Stat. 177. Around the same time, Congress passed the joint resolution that would become the Fourteenth Amendment. *See*

Hurd v. *Hodge*, 334 U.S. 24, 32 (1948). Throughout the debates on these measures, members of Congress recognized that economic sanctions posed a serious threat to personal liberty and private property. For example, in early 1866, one member of the House protested that Alabama was allowing "vagrants" to be "sold to the highest bidder" and that Mississippi had made it a crime for African Americans simply to lose their jobs. Cong. Globe, 39th Cong., 1st Sess. 588–90 (1866) (Rep. Donnelly). Another member decried what he viewed as an effort to reverse emancipation:

> Vagrant laws have been passed; laws which, under the pretense of selling these men as vagrants, are calculated and intended to reduce them to slavery again; and laws which provide for selling these men into slavery in punishment of crimes of the slightest magnitude . . . .

Id. at 1123–24 (Rep. Cook). One Senator similarly condemned Florida's system of punitive fines:

> Going across a piece of pasture ground, traveling through a forest belonging to an individual, cutting a twig from a standing tree, anything which amounts to a trespass willfully done may be punished by a fine not exceeding $1,000, which fine may be collected by selling the services of the man until he can work out the fine . . . .

Id. at 443 (Sen. Howe); *see also id.* ("A thousand dollars! That sells a negro for his life."). And another lawmaker drew attention to the Black Code of

Opelousas, Louisiana (the seat of St. Landry Parish), which included a provision requiring that African Americans obtain special permission to sell merchandise, on pain of forfeiture of the items, as well as "imprisonment and one day's labor, or a fine of one dollar." *Id.* at 516–17 (Rep. Elliot).

These catalogued abuses (among others) persuaded Congress and the ratifying public of the need for greater constitutional protections against the States. As a result, Section 1 of the Fourteenth Amendment secured a baseline of federal constitutional rights, providing that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; *see also McDonald*, 561 U.S. at 754; *cf. Hurd*, 334 U.S. at 32. The Nation in this way deemed existing constitutional protections—both state and federal—insufficient to guarantee certain indispensable rights, including the right to be free from excessive fines.

2. State-level protections drive home the point. At the same time that some southern States were violating their residents' fundamental rights, *see* pp. 19–22, *supra*, all States ranked the right to be free from excessive fines as fundamental. When the Fourteenth Amendment was ratified, in 1868, 35 of the 37 States (representing 92 percent of the American population at the time) included provisions in their state constitutions mirroring the language of the Excessive Fines Clause. *See* Steven G. Calabresi & Sarah E. Agudo,

Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?, 87 Tex. L. Rev. 7, 82 (2008). The two remaining States included proportionality clauses, enshrining the same basic right. *See* Ill. Const. of 1848, art. XIII, § 14; Vt. Const. of 1793, ch. II, § 32. As a result, every State that ratified the Fourteenth Amendment ranked protection from excessive fines as essential to our Nation's legal system. *Cf. McDonald*, 561 U.S. at 777 (looking to state constitutions during the period surrounding the Fourteenth Amendment's ratification). Every State continues to do so today. *See* Br. in Opp'n to Pet. for Cert. 8 (citing McLean, *supra*, at 876–77 & n.177).

The history surrounding the Eighth and Fourteenth Amendments thus confirms that the right to be free from excessive fines is "among those fundamental rights necessary to our system of ordered liberty." *See McDonald*, 561 U.S. at 778.[5]

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[5] The Court has already "incorporated almost all of the provisions of the Bill of Rights." *McDonald*, 561 U.S. at 764. Only a handful of protections remain unincorporated (or have yet to be addressed). With respect to the Fifth Amendment's Grand Jury Clause and the Seventh Amendment's right to a civil jury trial, the decisions rejecting their incorporation both "long predate the era of selective incorporation." *Id.* at 765 n.13. Under the selective-incorporation doctrine, the Court has concluded that the Sixth Amendment right to a criminal jury trial can be fulfilled without applying every dimension of that right to the States. *See Apodaca* v. *Oregon*, 406 U.S. 404, 407–11 (1972) (plurality opinion); *see also McDonald*, 561 U.S. at 766 n.14 (explaining the "unusual division among the Justices" in *Apodaca*). The Court has yet to address the Third Amendment and the Sixth Amendment's Vicinage Clause. And, of course, there is "a surprising amount of

C. The right to be free from excessive fines remains fundamental today.

In considering whether the Second Amendment is incorporated, three Members of the Court in *McDonald* evaluated not only the right's history, but also whether it had "remained fundamental over time." *See* 561 U.S. at 917 (Breyer, J., dissenting). Their analysis included "the extent to which incorporation will further other, perhaps more basic, constitutional aims" and whether incorporation would protect against laws "targeting 'discrete and insular minorities.'" *Id.* at 918, 921. By these metrics, the right to be free from excessive fines continues to be fundamental today. Like imprisonment, economic sanctions can effectively control a person's life, strip them of their property, and deprive them of their freedom. And as Indiana illustrates, these sanctions remain prone to abuse, with the government's impulse to raise "royal revenue" competing with its duty to act fairly and justly. *See Browning-Ferris Indus.*, 492 U.S. at 271.

1. The power to fine people and confiscate their property is the power to limit their freedom. Although modern fines seldom trigger "imprisonment for life," 4 William Blackstone, Commentaries *373, they can "amount to perpetual punishment" in other ways, *see* Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* 2 (2016). Losing a car or a home to forfeiture can be "financially devastating."

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confusion as to whether the Excessive Fines Clause has been incorporated." *SFF-TIR, LLC* v. *Stephenson*, 262 F. Supp. 3d 1165, 1224–30 n.78 (N.D. Okla. 2017) (internal quotation marks omitted).

Beth A. Colgan, "Fines, Fees, and Forfeitures" in 4 *Reforming Criminal Justice: Punishment, Incarceration, and Release* 207 (Erik Luna ed., 2017). The same is true of criminal debt. Defaulters may see their driver's licenses suspended or their voting rights withheld—often with no regard for their ability to pay. Alicia Bannon et al., *Criminal Justice Debt: A Barrier to Reentry* 24, 29 (2010). Even low-level offenders are subject to court monitoring until their fines are paid in full, which for some people can mean the rest of their lives. Harris, *supra*, at 16.

Others are jailed. Until recently, courts in Ferguson, Missouri, issued arrest warrants "as a routine response to missed court appearances and required fine payments." U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 3 (Mar. 4, 2015). Other state courts have established "auto-jail" policies for people who fail to pay their fines on time. *See State* v. *Nason*, 233 P.3d 848, 852 (Wash. 2010) (invalidating county's auto-jail provision); *see also Cain* v. *City of New Orleans*, 281 F. Supp. 3d 624 (E.D. La. 2017) (invalidating a similar policy), *appeal docketed*, No. 18-30955 (5th Cir. Aug. 22, 2018). Still others make defendants choose between payment and incarceration. *See* ACLU, *In for a Penny: The Rise of America's New Debtors' Prisons* 22–24 (2010) (detailing "fines or time" sentences in New Orleans Parish municipal courts). As the Framers of the Eighth and Fourteenth Amendments understood, the government's power to fine can have grave consequences for personal liberty.

2. The sovereign power to fine also remains uniquely prone to abuse. Unlike every other form of punishment (all of which cost the government money), "fines are a source of revenue." *Harmelin* v. *Michigan*, 501 U.S. 957, 978 n.9 (1991) (opinion of Scalia, J.). So "[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence." *Id.* Because "the State stands to benefit," *id.*, there is a pronounced risk that governments—federal, state, and local alike—will exercise their prosecutorial powers not to do justice, but to raise revenue.

In the 150 years since the Fourteenth Amendment was ratified, this risk has become reality time and again. For decades after the Civil War, fines fueled the peonage system, under which Southern whites kept black citizens in bondage. African Americans would be charged with "trivial offences" (or fabricated ones) and fined far beyond their ability to pay. *See* Mary Church Terrell, *Peonage in the United States: The convict lease system and the chain gangs*, in No. 366 The Nineteenth Century and After 306, 312–13 (1907). White landowners, sometimes colluding with local sheriffs and judges, would then pay the defendant's fines. In exchange, the defendant would be legally bound to work off the debt on a private plantation. *See id.* "The exhausting cruelty of the penal system made almost any private servitude preferable." Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The*

Peonage Cases, 82 Colum. L. Rev. 646, 653 (1982). So "[t]o avoid the chain gang, black convicts signed up with private employers who would pay their fines in return for much longer periods of forced labor." *Id.*

In this way, the peonage system used fines to keep African Americans in servitude well into the twentieth century. Demand for forced labor only increased as Southern industry modernized, which in turn "exerted powerful pressures on the criminal justice system." *Id.* at 692. "Small offenses were punished with sizable fines, and serious crimes were scaled down to misdemeanors so that fines could be assessed and undertaken by employers." *Id.*; *see also* Blackmon, *supra*, at 65. Some of these debt-slaves would never be free. Writing in 1907, activist Mary Church Terrell had "no doubt whatever that there are scores, hundreds perhaps, of coloured men in the South to-day who are vainly trying to repay fines and sentences imposed upon them five, six, or even ten years ago." Terrell, *supra*, at 313. Those who broke free would be rearrested and fined again, or prosecuted for fleeing, and so "kept chained to an everturning wheel of servitude." *United States* v. *Reynolds*, 235 U.S. 133, 146–47 (1914); *see also* Blackmon, *supra*, at 137–38, 145–46.

In the twenty-first century, punitive economic sanctions continue to be used "for raising revenue in unfair ways." *Browning-Ferris Indus.*, 492 U.S. at 272. Particularly at the state and local levels, "many lawmakers use economic sanctions in order to avoid increasing taxes while maintaining governmental services." Beth A. Colgan, *The Excessive Fines Clause:*

Challenging the Modern Debtors' Prison, 65 UCLA L. Rev. 2, 22 (2018). "[S]ome lawmakers even includ[e] increases in ticketing in projected budgets." *Id.* These sanctions "are disproportionately imposed on impoverished defendants," who often lack the political clout to object. *See* Harris, *supra*, at 14; *see also* Colgan, *Challenging the Modern Debtors' Prison*, *supra*, at 23. In Ferguson, for example, the Department of Justice determined that "[c]ity officials . . . consistently set maximizing revenue as the priority for . . . law enforcement activity." U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 9. The resulting policy of "aggressive code enforcement" fell hardest on the city's low-income, African American residents. *Id.* 4, 11.

And Ferguson is not unique. In nearby Pagedale, city officials adopted an aggressive code-enforcement strategy after state lawmakers capped the amount of revenue that cities could collect from traffic tickets. *See* Jennifer S. Mann, *Municipalities ticket for trees and toys, as traffic revenue declines*, St. Louis Post-Dispatch (May 24, 2015), https://tinyurl.com/y9owqnl4. Pagedale residents found themselves fined relentlessly for trivial violations like wearing sagging pants or having toys in front yards. *Id.* Even enjoying a beer within 150 feet of a grill could lead to a fine. Jennifer S. Mann, *Lawsuit filed against Pagedale for ticketing high grass and other code violations*, St. Louis Post-Dispatch (Nov. 4, 2015), https://tinyurl.com/yaf4h6s3. The number of non-traffic tickets in the city spiked 495 percent over a five-year period. Mann, *Municipalities ticket for trees and toys*, *supra*. In 2014, the city issued nearly enough

non-traffic tickets for every household in Pagedale to receive two. *Id.*; *see also* Consent Decree, *Whitner* v. *City of Pagedale*, No. 15-cv-1655 (E.D. Mo. May 21, 2018).

Civil forfeiture is exploited in similar ways. *See generally Hudson* v. *United States*, 522 U.S. 93, 103 (1997) ("The Eighth Amendment protects against excessive civil fines, including forfeitures." (citing *Austin* v. *United States*, 509 U.S. 602, 622 (1993)). At the federal level, and in many States, when property is forfeited most (and often all) of the resulting proceeds go directly to law enforcement, frequently into the coffers of the seizing agency itself. As a result, state and federal law-enforcement agencies increasingly use civil forfeiture as a revenue-raising tool. In 2012, agencies in 26 States and the District of Columbia took in more than $254 million through forfeiture under state laws alone. Institute for Justice, Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 11 (2d ed. 2015) (noting that deriving totals for all 50 States is "impossible because most states require little to no public reporting of forfeiture activity"). And nationwide, the modern civil-forfeiture system "has led to egregious and well-chronicled abuses." *Leonard* v. *Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari). Like economic sanctions more broadly, forfeitures "frequently target the poor and other groups least able to defend their interests in forfeiture proceedings." *Id.*; *cf. McDonald*, 561 U.S. at 921 (Breyer, J., dissenting) (inquiring

whether the right at issue protects against laws that "target[ ] 'discrete and insular minorities' ").

3. Indiana—where this case arises—highlights some of the most dangerous practices in the Nation today. Unlike in every other State, Indiana statutes allow prosecutors to outsource civil-forfeiture cases to private lawyers on a contingency-fee basis. This case, for example, was prosecuted by a private law firm. *See* State C.A. App. pp. 10–11 (complaint). And even while the Petition for Certiorari was pending, Indiana codified fixed percentages of civil-forfeiture revenue that private-sector lawyers can collect. Ind. P.L. 47-2018, § 5; *see generally* David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 1.01, at 1-13 (2018) ("The biggest scandal of all is Indiana's institutionalized bounty hunter system in which state [prosecutors] contract with *private* attorneys to handle all of the county's civil forfeiture cases for a contingent fee of a quarter or a third of all the property they forfeit.").

This system of mercenary prosecutors magnifies the Excessive Fines Clause's animating concern: that prosecutorial power will be harnessed "for raising revenue in unfair ways, or for any other improper use." *Browning-Ferris Indus.*, 492 U.S. at 272. Predictably, private-sector lawyers in Indiana pocket hundreds of thousands of dollars every year based on forfeitures. *See generally* Heather Gillers et al., *Cashing in on crime: Indiana law allows prosecutors to farm out forfeiture cases to private lawyers—who get a cut of the money*, The Indianapolis Star, Nov. 14, 2010, at A1. One deputy prosecutor even litigated criminal cases while

moonlighting as a contingency-fee lawyer in related forfeiture proceedings. "On numerous occasions when the ethics of the asset forfeiture procedures were called into question," the Indiana Supreme Court later found, "[the prosecutor] turned a blind eye and acted to protect his private interest in his continued pursuit of forfeiture property." *In re McKinney*, 948 N.E.2d 1154, 1155–56 (Ind. 2011). In the same county, a trial court condemned such practices as "a carefully crafted assault on the judicial system and court adjudication in civil forfeitures." *Findings and Report on Civil Drug Forfeitures in Division 2, Including a Limited Number of Cases in the Other Four Divisions of the Delaware Circuit Court*, at 6 (Ind. Cir. Ct. Aug. 18, 2008), https://tinyurl.com/ybjkw7z8; *see also* Ind. P.L. 47-2018, § 5 (barring deputy prosecutors from entering into forfeiture contracts).

Law-enforcement officials in Indiana do not hide the fact that they view economic sanctions as an important source of revenue. For example, Indianapolis police set annual targets for their state and federal forfeiture funds. *See, e.g.*, Hrg. of Indianapolis City-Cty. Council Pub. Safety & Crim. Justice Comm. (July 18, 2012), at 36:36–37:15, https://tinyurl.com/y9b5cpqr. And last year, another county's prosecutor told the General Assembly that he would abandon forfeiture altogether if his office were to lose its stake in forfeiture revenue: "I'm not going to hire anybody to do forfeitures to collect money for the State of Indiana. If my office isn't getting money, I'm not going to be able to pay them for that, and—why am I going to do the extra

work and not have some benefit that comes out of it?" Hrg. of Ind. Senate Corrs. & Crim. Law Comm. (Jan. 10, 2017), at 2:27:11–2:27:23, https://tinyurl.com/y9hnzrto.

For ordinary citizens, the real-world consequences can be devastating. With economic sanctions serving as both punishment and revenue source, "law enforcement Weapons of Mass Destruction" are increasingly deployed against "pedestrian targets." *Sargent* v. *State*, 27 N.E.3d 729, 735 (Ind. 2015) (Massa, J., dissenting). As one prosecutor announced after law enforcement in Indiana first gained a financial stake in civil forfeiture, "the statute is limited only by your own creativity." Joseph T. Hallinan, *Police can take crime cash but can't dish it out*, The Indianapolis Star, Feb. 2, 1986, at 6B. And prosecutors have been creative. In one case, prosecutors sued to forfeit a teenager's car, after it was found with "a large quantity of Gatorade bottles and assorted snacks and candies" stolen from a playground concession stand. *See* Pls.' Mot. Summ. J., *State* v. *Jaynes*, No. 49D01-1111-MI-043642, 2012 WL 12974140 (Ind. Super. Ct. May 23, 2012); *see also* Ind. Code § 34-24-1-1(a)(1)(B) (providing for forfeiture of any vehicle used to transport stolen property valued at $100 or more). In another case, prosecutors attempted to forfeit a woman's 1996 Buick Century after she tried (and failed) to shoplift four iPhones. *Sargent*, 27 N.E.3d at 731. When the Indiana Supreme Court rejected this forfeiture on statutory grounds, *see id.* at 733, even a dissenting justice voiced bewilderment at the State's "overreach," *id.* at 735 (Massa, J., dissenting).

Local officials in Indiana have even used economic sanctions to drive people from their homes. Since 2016, code-enforcement officers in Charlestown, Indiana, have flooded a low-income neighborhood with millions of dollars in property citations. Using fines, the mayor and the city sought to help a developer buy property in the neighborhood. A court later found: "The Mayor anticipated that the plan to enforce the . . . property-maintenance code . . . would impose such steep fines on the owners of the [neighborhood] properties that they would be willing to sell to a developer . . . for demolition." Findings of Fact & Conclusions of Law, *Charlestown Pleasant Ridge Neighborhood Ass'n* v. *City of Charlestown*, No. 10C02-1701-CT-010, 2017 WL 9934162, at ¶ 31 (Ind. Cir. Ct. Dec. 4, 2017), *appeal docketed*, 10A01-1712-CT-02896 (Ind. Ct. App. Dec. 15, 2017). The plan proved successful. With fines "add[ing] up to significant sums very quickly," *id.* ¶ 42, many landlords opted to sell to the developer, *id.* ¶ 44, forcing hundreds of low-income tenants to relocate as the developer began boarding up homes, *id.* ¶¶ 48-49.

It is precisely because these and other abuses persist that the right to be free from excessive fines remains "fundamental to our scheme of ordered liberty" today. *See McDonald*, 561 U.S. at 767 (emphasis omitted). Now—as in 1689, 1791, and 1868—economic sanctions combine the government's appetite for revenue with the "terrifying force of the criminal justice system." *Robertson* v. *United States ex rel. Watson*, 560 U.S. 272, 273 (2010) (Roberts, C.J., dissenting from dismissal of certiorari). History demonstrates that abuses

will follow. For this reason, the Excessive Fines Clause remains an essential constitutional safeguard against unjust economic sanctions.

D. Applying the Clause to the States is consistent with Eighth Amendment precedent.

Finally, incorporating the Excessive Fines Clause is consistent with Eighth Amendment precedent. Although this Court in the late nineteenth century indicated that the Eighth Amendment did not apply to the States, *see In re Kemmler*, 136 U.S. 436, 448–49 (1890), it has long since "repudiated" that view, *Baze* v. *Rees*, 553 U.S. 35, 115 (2008) (Ginsburg, J., dissenting); *see also Malloy* v. *Hogan*, 378 U.S. 1, 6 n.6 (1964); *cf. McDonald*, 561 U.S. at 764 ("The Court eventually incorporated almost all of the provisions of the Bill of Rights."). Thus, the Cruel and Unusual Punishments Clause has been held to apply to the States for over half a century. *See Robinson* v. *California*, 370 U.S. 660, 666–67 (1962). Likewise, the Excessive Bail Clause has long "been assumed to have application to the States through the Fourteenth Amendment." *Schilb* v. *Kuebel*, 404 U.S. 357, 365 (1971); *see also Baker* v. *McCollan*, 443 U.S. 137, 144 n.3 (1979). And in recent decades, the Court has remarked that the Eighth Amendment's three Clauses apply to the States with equal force. In *Kennedy* v. *Louisiana*, for example, the Court observed that "the separate States are bound by the proscriptive mandates of the Eighth Amendment." 554 U.S. 407, 412 (2008); *see also id.* at 419. In *Roper* v. *Simmons*, the

Court commented that the Eighth Amendment as a whole "is applicable to the States through the Fourteenth Amendment." 543 U.S. 551, 560 (2005). Many other opinions include statements to the same effect. *See supra* at p. 1 & n.1.

These statements confirm what to many state courts has long been obvious: The Excessive Fines Clause is incorporated against the States. The three Clauses of the Eighth Amendment embody "parallel limitations" on the government's power to punish. *Browning-Ferris Indus.*, 492 U.S. at 263. Put differently, they work together to "place[] limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments." *Id.* at 275; *see also Austin*, 509 U.S. at 607. As a result, there is "no reason to distinguish one Clause . . . from another for purposes of incorporation." *Browning-Ferris Indus.*, 492 U.S. at 284 (O'Connor, J., concurring in part and dissenting in part). The Court should thus adhere to its prior statements and hold that the Excessive Fines Clause applies to the States.

II. The Excessive Fines Clause applies to the States under the Fourteenth Amendment's Privileges or Immunities Clause.

Although this Court's incorporation cases "have been built upon the substantive due process framework," *McDonald*, 561 U.S. at 812 (Thomas, J., concurring in part and concurring in the judgment), the

Privileges or Immunities Clause provides an alternative basis for applying the Excessive Fines Clause to the States.

1. The original public meaning of "privileges or immunities" was synonymous with "rights," *id.* at 813, and the right to be free from excessive fines ranks among those rights of citizenship that the Privileges or Immunities Clause protects. At the time of ratification, the Clause was publicly understood to "enforce[] at least those fundamental rights enumerated in the Constitution against the States." *Id.* at 835. Not only was the right to be free from excessive fines enumerated in the Constitution, it was regarded as fundamental long before the Founding. *Supra* at pp. 10–25. Like the right to keep and bear arms, then, the right to be free from excessive fines fits comfortably within the original public meaning of the Privileges or Immunities Clause.[6]

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[6] The rights in the first eight Amendments are not the only "privileges or immunities." *See, e.g.*, Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. Pa. J. Const. L. 1295, 1303 (2009); Amar, *supra*, at 208–10; Curtis, *supra*, at 41, 74–75, 219. On the contrary, as the principal author of the Fourteenth Amendment observed, the "privileges and immunities of citizens of the United States . . . are *chiefly* defined in the first eight amendments." Cong. Globe, 42d Cong., 1st Sess. App. 84 (1871) (emphasis added); *cf. McDonald*, 561 U.S. at 831 (Thomas, J., concurring in part and concurring in the judgment) (documenting public awareness that the Fourteenth Amendment would, "*at a minimum*, enforce constitutionally enumerated rights of United States citizens against the States") (emphasis added).

2. The Court need not overrule any prior decisions to rule for Petitioner based on the Privileges or Immunities Clause. Neither the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), nor subsequent decisions relying on *Slaughter-House* have squarely addressed whether the "privileges or immunities of citizens" include protection against excessive fines and whether that right applies to the States. *Cf. McDonald*, 561 U.S. at 808 (Thomas, J., concurring in part and concurring in the judgment) (noting that *Slaughter-House* "arguably left open the possibility that certain individual rights enumerated in the Constitution could be considered privileges or immunities of federal citizenship"); *accord* Gerard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?*, 94 Minn. L. Rev. 102, 105 (2009) (noting that "[a] careful examination reveals nothing in *Slaughter-House* that is inconsistent with incorporation"). Because nothing in this Court's precedents answers the question whether the Privileges or Immunities Clause incorporates protection from excessive fines, no precedents necessarily need to be overruled to follow the original public meaning of the Privileges or Immunities Clause.

However, *Slaughter-House* should be overruled at least to the extent that the Court reads it to preclude incorporation under the Privileges or Immunities Clause. *See McDonald*, 561 U.S. at 855 (Thomas, J., concurring in part and concurring in the judgment).[7]

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[7] Virtually "everyone" agrees that *Slaughter-House* was wrongly decided. Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the*

And to the extent that subsequent decisions have relied on the Court's reasoning in *Slaughter-House* to suggest—incorrectly—that the rights enumerated in the first eight Amendments are not "privileges or immunities of citizens of the United States," those decisions should also be overruled. *See Maxwell* v. *Dow*, 176 U.S. 581, 597 (1900); *O'Neil* v. *Vermont*, 144 U.S. 323, 332 (1892); *In re Kemmler*, 136 U.S. 436, 446 (1890). Despite *Slaughter-House* and its progeny, the correct textual and historical view of the Fourteenth Amendment would acknowledge that the Privileges or Immunities Clause provides an alternative basis for incorporation of, at minimum, the individual rights protected in the first eight Amendments.

In summary, incorporation of the Excessive Fines Clause is warranted under the Due Process Clause or the Privileges or Immunities Clause. Under either provision (or both), the Excessive Fines Clause applies to the States.

Slaughter-House Cases, 70 Chi. Kent L. Rev. 627, 627 (1994); *cf.* Laurence H. Tribe, *American Constitutional Law* 1320–21 (3d ed. 2000) ("The textual and historical case for treating the Privileges or Immunities Clause as the primary source of federal protection from state rights infringement is very powerful indeed."); Amar, *supra*, at 213 (explaining "[t]he obvious inadequacy—on virtually any reading of the Fourteenth Amendment—of [Justice] Miller's opinion" in *Slaughter-House*).

CONCLUSION

This Court should reverse the judgment of the Indiana Supreme Court and remand for further proceedings.

Respectfully submitted,

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